

KHURANA (Migration) [2017] AATA 1031 (19 June 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr RANKAJ KHURANA
Mrs JYOTI KHURANA
Ms SHRIYA KHURANA
Ms SHUBHIKA KHURANA

CASE NUMBER: 1620308

DIBP REFERENCE(S): BCC2016/3471775

MEMBER: Jennifer Ciantar

DATE: 19 June 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal sets aside the decision under review and substitutes a decision not to cancel the first named applicant's Subclass 189 - Skilled - Independent visa.

The Tribunal has no jurisdiction with respect to the other applicants.

Statement made on 19 June 2017 at 1:24pm

CATCHWORDS

Migration – Cancellation – Skilled - Independent visa – Subclass 189 – Incorrect information – Bogus skills assessment – Positive skills assessment at time of application – No jurisdiction with secondary applicants

LEGISLATION

Migration Act 1958, ss 101(b), 102, 103, 104, 105, 107, 109(1), 116(1)(a), 140(1)
Migration Regulations 1994

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to cancel the first named applicant's Subclass 189 - Skilled - Independent visa under s.109(1) of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa on the basis that the first named applicant (the applicant) had not complied with s.101(b) and s.103 of the Act because he gave incorrect answers on the visa application form about whether he held a valid skills assessment and he provided a bogus document from Engineers Australia dated 8 December 2014 (sic). The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. For the purposes of the Tribunal's jurisdiction, the only decision that is before the Tribunal is that with respect to the first named applicant (the applicant). The other visas were automatically cancelled as a consequence of that cancellation, not by a decision but by force of the operation of s.140(1) of the Act. As no decision was involved in the visa cancellation under s.140(1), the Tribunal has no jurisdiction with respect to the other applicants. The Tribunal also has no jurisdiction in respect of the fourth named applicant, Shubhika Khurana, because she is an Australian citizen and her application for review was withdrawn on 15 June 2017.
4. The applicants were represented in relation to the review by their registered migration agent.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. Section 109(1) of the Act allows the Minister to cancel a visa if the visa holder has failed to comply with ss.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require non-citizens to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances.
7. The exercise of the cancellation power under s.109 of the Act is conditional on the Minister issuing a valid notice to the visa holder under s.107 of the Act, providing particulars of the alleged non-compliance. Where a notice is issued that does not comply with the requirements in s.107, the power to cancel the visa does not arise. Extracts of the Act relevant to this case are attached to this decision.
8. In the present matter, the Tribunal is satisfied that the delegate had reached the necessary state of mind to engage s.107 and that the notice issued under s.107 complied with the statutory requirements.

WAS THERE NON-COMPLIANCE AS DESCRIBED IN THE S.107 NOTICE?

9. The issue before the Tribunal is whether there was non-compliance in the way described in the s.107 notice, being the manner particularised in the notice, and if so, whether the visa should be cancelled. The non-compliance identified and particularised in the s.107 notice was non-compliance with s.101 and s.103 in the following respects. The applicant applied for

a class SI 189 Skilled Independent visa on 8 December 2014. On the visa application he provided details of a skills assessment conducted by Engineers Australia on 4 August 2014 and he declared that he had provided complete and correct information in every detail on the form and attachments. The attachments included a letter from Dipak Pathod, Qualifications Assessor, Engineers Australia, dated 4 August 2014, which advised that the applicant had been assessed as meeting the current academic requirement for standing as a Professional Engineer (Skill Level 1) in Australia and his occupational classification for migration purposes is Electrical Engineer ANZSCO 233311.

10. However, on 12 October 2016 Engineers Australia wrote to the Department and the applicant and advised that the applicant's migrant skills assessment was invalid due to plagiarism. The Department considers that the applicant had provided incorrect answers on pages 9 & 16 of the visa application form as he does not hold a valid skills assessment from a relevant assessing authority. Also, he provided a bogus document from Engineers Australia, dated 8 December 2014 (sic).
11. On 3 May 2017 the applicant provided the Tribunal with a letter dated 3 May 2017 from Dipak Pathod, Qualifications Assessor, Engineers Australia, which advises that Engineers Australia is pleased to advise that on the basis of the competencies the applicant has demonstrated, taken in conjunction with his qualification, the applicant meets the requirement for the occupation of Professional Engineer (Skill Level 1) in Australia and his occupational classification is Electrical Engineer ANZSCO 233311, and the date is June 2002. The applicant's highest relevant qualification is his bachelor degree completed in June 2002 from Kurukshetra University.
12. On 6 June 2017 the applicant provided the Tribunal with a submission. The applicant stated that he was granted a Skilled Independent visa on 6 March 2015. The Department issued a Notice of intention to consider cancellation (NOICC) on 11 November 2016. The letter was misleading because it referred to a document dated 8 December 2014 from Engineers Australia and the applicant was confused as to whether the delegate meant that the applicant did not hold a suitable skills assessment at the time of application or that he did not hold a suitable skills assessment at the time the NOICC was issued. The applicant claims he has never provided a bogus document from Engineers Australia, dated 8 December 2014, and he did not provide this document with his visa application. In this sense, the notice is defective by referring to a bogus document dated 8 December 2014. The applicant claims that the delegate failed to give him the notice with the correct grounds of cancellation as the delegate did not specify which particular provision under s.103 the applicant did not comply with. The applicant has never held a document from Engineers Australia dated 8 December 2014 as alleged by the delegate. The document which the applicant had provided from Engineers Australia with his visa application had been dated 4 August 2014.
13. It is also submitted that after receiving the NOICC the applicant contacted Engineers Australia and learned that their letter to him regarding his skills assessment being invalid had been sent to his previous address in India although the applicant was residing in Australia. The applicant was not provided with an opportunity to respond to this correspondence until it was brought to his attention by the NOICC. The applicant responded to the NOICC on 25 November 2016 and advised that he was in contact with Engineers Australia. However, the delegate cancelled the applicant's visa on 30 November 2016 and in the decision record, the delegate states that the applicant did not reply to the notice.
14. The applicant also points out that the letter dated 12 October 2016 from Engineers Australia states that "our re-assessment has identified that your career episodes have been copied – either from a standard work reference, all from another client's application(s)." The applicant submits that the letter dated 12 October 2016 from Engineers Australia was the result of a re-assessment of his application and that this means that the positive skills assessment

letter dated 4 August 2014 remained in force until the reassessment took place, which was approximately two years and two months after the positive skills assessment was issued. Therefore, the applicant provided a valid and non-bogus skills assessment document with his visa application.

15. The submission also notes that the delegate has incorrectly referred to the applicant not complying with s.102 of the Act, which concerns passenger cards. The applicant then provides arguments as to why the Tribunal should exercise its discretion to not cancel the visa, if the Tribunal finds that there are grounds for cancellation.
16. The applicant has also explained in his letter that he was advised by Engineers Australia to apply for a reassessment online, which he did; this was not a new skills assessment application but was a re-assessment as is evident from the tax invoice/receipt issued to the applicant. On 3 May 2017 Engineers Australia provided the applicant with a positive assessment for the occupation of Electrical Engineer and he still holds a valid skills assessment. If he had been given an opportunity in October 2016 to respond to the previous reassessment his visa would not have been cancelled given that he was then given a positive assessment.

17. Consideration

18. The Tribunal has verified the letter dated 3 May 2017 from Dipak Pathod, Qualifications Assessor, Engineers Australia, on the Engineers Australia website. The Tribunal is satisfied that the applicant has a positive skills assessment from Engineers Australia for the occupation of Electrical Engineer ANZSCO 233311. The assessment was based on the applicant's qualifications obtained in 2002 in conjunction with competencies that the applicant has demonstrated. The evidence before the Tribunal does not provide any detail as to whether the competencies that the applicant demonstrated were the same competencies that were assessed for the positive skills assessment issued on 4 August 2014, which was later invalidated. However, the qualification used in both assessments is the same; it is the bachelor degree obtained by the applicant in 2002.
19. The Tribunal has taken into account that at the time that the applicant lodged the visa application on 8 December 2014 he had a positive skills assessment dated 4 August 2014 and he has again been issued with a positive skills assessment dated 3 May 2017. The delegate found that the original skills assessment dated 4 August 2014 (mistakenly referred to as 8 December 2014 in the NOICC) was a bogus document because on 12 October 2016 Engineers Australia had reassessed the applicant's skills and decided that the previous skills assessment was invalid. However, this was a reassessment that occurred some 2 years after the applicant lodged the visa application. The Tribunal is not persuaded that at the time of lodgement the skills assessment dated 4 August 2014 was a bogus document as defined in s.103 or that the applicant had deliberately provided incorrect answers on the visa application, as required by s.101 of the Act because at the time he applied for the visa, the applicant held a positive skills assessment. The Tribunal is of the view that when Engineers Australia conducted the reassessment and invalidated the skills assessment, cancellation under the provisions of s.116(1)(a): circumstances which permitted the grant of the visa no longer exist, might have been more appropriate.
20. However, as the applicant now has, and had at the time of visa lodgement, a positive skills assessment the Tribunal is not satisfied that the applicant gave incorrect information on the visa application or that he provided a bogus document.
21. For these reasons, the Tribunal finds that there was no non-compliance by the applicant in the way described in the s.107 notice. It follows that the discretionary power to cancel the applicant's visa does not arise.

22. **DECISION**

- 23. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the first named applicant's Subclass 189 - Skilled - Independent visa.
- 24. The Tribunal has no jurisdiction with respect to the other applicants.

Jennifer Ciantar
Member

ATTACHMENT – Relevant Extracts from the *Migration Act 1958*:

5 Interpretation

- (1) In this Act, unless the contrary intention appears:
- bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

passenger card has the meaning given by subsection 506(2) and, for the purposes of section 115, includes any document provided for by regulations under paragraph 504(1)(c).

Note: **Bogus document** is defined in subsection 5(1).

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

99 Information is answer

Any information that a non-citizen gives or provides, causes to be given or provided, or that is given or provided on his or her behalf, to the Minister, an officer, an authorised system, a person or the Tribunal, or the Immigration Assessment authority, reviewing a decision under this Act in relation to the non-citizen's application for a visa is taken for the purposes of section 100, paragraphs 101(b) and 102(b) and sections 104 and 105 to be an answer to a question in the non-citizen's application form, whether the information is given or provided orally or in writing and whether at an interview or otherwise.

100 Incorrect answers

For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.

101 Visa applications to be correct

A non-citizen must fill in or complete his or her application form in such a way that:

- (a) all questions on it are answered; and
- (b) no incorrect answers are given or provided.

103 Bogus documents not to be given etc.

A non-citizen must not give, present, [produce]* or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, [produced]¹ or provided.

107 Notice of incorrect applications

- (1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:
- (a) giving particulars of the possible non-compliance; and

* This wording applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014).

¹

- (b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:
 - (i) if the holder disputes that there was non-compliance:
 - (A) shows that there was compliance; and
 - (B) in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or
 - (ii) if the holder accepts that there was non-compliance:
 - (A) give reasons for the non-compliance; and
 - (B) shows cause why the visa should not be cancelled; and
 - (c) stating that the Minister will consider cancelling the visa:
 - (i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or
 - (ii) if the holder gives the Minister a written response within that period—when the response is given; or
 - (iii) otherwise—at the end of that period; and
 - (d) setting out the effect of sections 108, 109, 111 and 112; and
 - (e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and
 - (f) requiring the holder:
 - (i) to tell the Minister the address at which the holder is living; and
 - (ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.
- (1A) The period to be stated in the notice under subsection (1) must be:
- (a) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or
 - (b) otherwise—14 days.
- (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:
- (a) visas of a stated class; or
 - (b) visa holders in stated circumstances; or
 - (c) visa holders in a stated class of people (who may be visa holders in a particular place); or
 - (d) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.
- (2) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.